

1 DANELLE HARRISON, in her official
2 capacity as Forest Supervisor of the San
3 Bernardino National Forest of the
4 U.S. Forest Service,

5 MICHAEL NOBLES, in his official
6 capacity as Front Country District
7 Ranger of the U.S. Forest Service,

8 Defendants.

9 YUHAAVIATAM OF SAN MANUEL
10 NATION, a federally recognized Indian
11 tribe, also federally recognized as SAN
12 MANUEL BAND OF MISSION
13 INDIANS,

14 [PROPOSED] Plaintiff-Intervenor.
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16 SOMACH SIMMONS & DUNN
17 A Professional Corporation
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1 Proposed Plaintiff-Intervenor Yuhaaviatam of San Manuel Nation, a
2 federally recognized Indian tribe, also federally recognized as the San Manuel Band
3 of Mission Indians (the “Nation”)¹, by and through its undersigned counsel of
4 record, hereby replies to the briefs opposing the Nation’s Motion to Intervene and
5 corresponding Motion for Preliminary Injunction filed by Defendants (and Amicus
6 Save Our Forest Association [SOFA]) in the captioned matter. ECF Nos. 80-82.

I. INTRODUCTION

The reason the Nation seeks to intervene and obtain preliminary injunctive relief in this matter is simple: after August 26, 2024, when Defendants modified the decision to allow for continued deliveries of the Subject Water through BlueTriton’s facilities for the Nation’s use at Arrowhead Springs through January 15, 2025, *see* ECF No. 27-1, the Nation reasonably believed Defendants understood the critical importance of the Subject Water to the Nation, not simply for cultural and governmental uses, but to protect Arrowhead Springs and the community-at-large from wildfire. Accordingly, the Nation believed Defendants would work with the Nation to develop an out-of-court solution allowing for continued water deliveries *beyond* January 15, 2025, whether that be in the form of another extension or through some other means. That reasonable expectation did not materialize, as it became clear over time that Defendants were unwilling to collaborate to find a solution that would allow for continued deliveries, regardless of the merits of the Nation’s proposals, leaving the Nation no choice but to seek relief from this Court to avoid irreparable harm upon the expiration of the temporary authorization.

24 The following sections demonstrate why Defendants' arguments in
25 opposition to the Nation's Motion to Intervene and corresponding Motion for

²⁶ ²⁷ ²⁸ ¹ Any other shorthand or abbreviated terms are defined in the Nation's Notice and Motion to Intervene; Memorandum of Points and Authorities; and Request for Order Shortening Time (Motion to Intervene). ECF No. 64.

1 Preliminary Injunction lack merit, and why the Court should grant intervention and
2 issue a preliminary injunction against Defendants.

3 **A. The Agency Action in Question Directly Implicates the Nation's
4 Protectable Interests Relating to Property that Is Subject to the Action**

5 Defendants' opposition to the Nation's intervention largely rests on the
6 premise that the Nation's water rights are not implicated by Defendants' Notice of
7 Denial and that the Nation lacks a legal right in BlueTriton's special use permit
8 (SUP). ECF No. 80 at 2, 7-9. This is an unduly narrow conception of the legally
9 protectable interest element of intervention. The Nation has an undisputed
10 contractual right to obtain water from BlueTriton that will be rendered meaningless
11 if the Notice of Denial is not enjoined (in some fashion), which meets the third-
12 party beneficiary test established by the Ninth Circuit. *See Sw. Ctr. for Biological
13 Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

14 The Notice of Denial specifically acknowledges that BlueTriton delivers
15 water to the Nation's Arrowhead Springs and misrepresents the facts surrounding
16 the Nation's operations there. ECF No. 1-1 at 2-3. Defendants well know that the
17 Nation relies on water deliveries from BlueTriton to operate Arrowhead Springs
18 and that the Nation and surrounding communities rely on the Subject Water for
19 wildfire suppression purposes. Indeed, Defendants went so far as to ask BlueTriton
20 for information about the Nation's water use—without ever asking the Nation, let
21 alone consulting with the Nation before taking an adverse action that would cease
22 all water deliveries to the Nation's Arrowhead Springs. ECF No. 65-4 at 2. This
23 critical reliance upon the Subject Water is exactly why Defendants twice modified
24 the Notice of Denial to allow BlueTriton to continue delivering water to the Nation
25 while it could explore other water supply options. ECF Nos. 15-21, 27-1. This
26 reliance is also why Defendants engaged with the Nation in 2016 when considering
27 BlueTriton's prior SUP, apparently then recognizing the Nation's distinct interests
28

1 in the permit, and the federal government's trust responsibility to a federally-
2 recognized tribe. ECF No. 81-4.

3 As described in the Nation's pending motions, the owners of Arrowhead
4 Springs have received and relied on the Subject Water continuously since 1931, and
5 it would require significant time (a minimum of three years) if the Nation must
6 resort to securing municipal connections or developing new infrastructure that
7 would allow the Nation to divert water from Strawberry Creek without
8 BlueTriton's infrastructure. *See Declaration of Joanne Michelle Hickey in Support*
9 *of Nation's Motion to Intervene and Motion for Preliminary Injunction (Hickey*
10 *Decl.) at ¶¶ 6-9; ECF No. 65-6 at ¶ 12; ECF No. 65-10 at ¶ 10.* The Notice of
11 Denial and subsequent modifications constitute one agency action that directly
12 implicates the Nation's interests of protecting its primary water supply for
13 Arrowhead Springs. Ninth Circuit precedent holds that “[a] [t]ribe’s sovereign
14 interest is precisely the type of interest that . . . has [been] identified for protection
15 under the Federal Rules.” Citing *Diné Citizens Against Ruining Our Env’t*,
16 932 F.3d 843, 853-56, 860 (9th Cir, 2019); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310,
17 1312 (9th Cir, 1996)); *Backcountry Against Dumps v. United States BIA*, No. 20-
18 CV-2343 JLS (DEB), 2021 U.S. Dist. LEXIS 112202, at *13 (S.D. Cal. June 14,
19 2021) (*Backcountry*). Not only is the Nation’s access to SBNF to exercise its water
20 rights implicated by the Notice of Denial, so is its sovereignty. The agency’s
21 adverse decision will not only halt water supplies for Arrowhead Springs,
22 threatening the Nation’s right to control and protect tribal resources and cultural
23 values, but also the property itself (and surrounding area) from wildfire. *See*
24 *generally McCleary Decl.*, ECF No. 65-9; Declaration of Keith Alexander in
25 *Support of Nation's Motion to Intervene and Motion for Preliminary Injunction*
26 *(Alexander Decl.) at ¶¶ 3-4.* As in the *Backcountry* case, here “[t]he [Nation]’s
27 interest is tied to its very ability to govern itself, sustain itself financially, and make
28 decisions about its own natural resources.” *Backcountry*, at *15.

1 **B. The Nation Is Actively Pursuing Every Potential Avenue to Obtain an
2 Out-of-Court Solution for Continued Deliveries of the Subject Water,
3 Including a SUP from Defendants, But Requires Additional Time**

4 Contrary to Defendants' assertions, *see* ECF No. 80 at 14 ("[i]f the Nation
5 needs a Special Use Permit to access its water rights on the San Bernardino
6 National Forest, the Forest Service continues to invite the Nation to apply for one,"
7 US Opp. to Order Shortening Time, ECF No. 66 at 2), the Nation has worked
8 tirelessly with Defendants to develop a solution that allows for continued deliveries
9 of the Subject Water beyond January 15, 2025, *including* by laying the groundwork
10 to secure its own SUP, an option that USFS's parent agency, the USDA,
11 affirmatively encouraged, assuring the Nation's leaders that this was a viable
12 vehicle that could ensure continued water deliveries beyond January 15, 2025. *See*
13 *generally* Declaration of Allison Binney in Support of Motion to Intervene and
14 Motion for Preliminary Injunction (Binney Decl.) at ¶¶ 29-35, 40; Hickey Decl.
15 at ¶¶ 7-9. Indeed, the Under Secretary for the USDA indicated Defendants could
16 further modify the Notice to continue water deliveries while the Nation took the
17 time needed to pursue a SUP. Binney Decl. at ¶¶ 32, 40. And contrary to
18 Defendants' assertion, the Nation did not "reject" this path, but rather, was involved
19 in preparing an application for the SUP, as the USDA officials said could be
20 approved expeditiously. Binney Decl. at ¶¶ 32-40; Hickey Decl. at ¶ 7.

21 Instead, at every turn, Defendants have discounted the Nation and come up
22 with new reasons as to why the Nation is not entitled to a SUP or why Defendants
23 cannot re-extend the temporary authorization. *See generally* Binney Decl. The last
24 reason involved questioning the Nation's very water rights, *id.* at ¶ 42, which
25 Defendants lack standing to do, as they have conceded, ECF No. 80 at 7, as they
26 lack authority to determine water rights, and that the SWRCB has itself
27 acknowledged. *See* ECF No. 15-6 at 91 ("[the Nation] has riparian rights that
28 authorize diversions through these facilities for beneficial uses on the Arrowhead
Springs Hotel property"). The Nation also has aboriginal water rights that would

1 allow such deliveries. Finally, Defendants' alleged invitation is disingenuous—it is
2 contradictory for Defendants to invite the Nation to apply for a SUP, on the one
3 hand, and then actively try to remove the facilities that the Nation would be using
4 for a prospective SUP, on the other.

5 The Nation has explored and continues to explore alternative solutions, such
6 as connecting to a municipal system, should the Nation be unable to secure
7 authorization to use and access SBNF lands from Defendants. *See* Binney Decl. at
8 ¶¶ 15, 19, 26-27; Hickey Decl. at ¶ 6; ECF No. 65 at ¶ 22. Regardless of what
9 solution is ultimately reached, it is going to take significant time to attain. *See*
10 Binney Decl. at ¶¶ 14-15, 24, 31; Hickey Decl. at ¶ 6; ECF No. 65 at ¶ 22. As such,
11 the Nation merely asks the Court to effectively impose a stopgap so that there is not
12 an interim period where water deliveries cease (or worse, the facilities are removed)
13 while the Nation continues to pursue solutions that ensure continued deliveries of
14 the Subject Water to Arrowhead Springs. Such a stopgap would provide the
15 definitive solution expressed as viable and expeditiously achievable by the USDA
16 so as to allow for water to continue to be delivered to Arrowhead Springs. Binney
17 Decl. at ¶¶ 32, 40. Because Defendants' arguments demonstrate no exigent reasons
18 or factual determination to support the immediacy of the Notice of Denial, there is
19 no counterbalance to the Nation's request to preserve the status quo.

20 In sum, the Nation reasonably believed that it could develop an out-of-court
21 solution with Defendants, ECF No. 65 at ¶ 23, exhausting every potential avenue.
22 *See generally* Binney Decl.; Hickey Decl. at ¶¶ 7-9. The Nation had no choice but
23 to turn to this Court for relief when it recently became apparent that Defendants are
24 entrenched in their positions and, notwithstanding the support of the USDA, are
25 themselves determined to shut off water deliveries to Arrowhead Springs after
26 January 15, 2025, and remove the facilities from SBNF lands thereafter, whatever
27 the cost. *See* ECF No. 65 at ¶ 23; *cf.* ECF No. 73 at 2-3 (discussing Defendants'
28 continued intention to "order[] BlueTriton to implement the [decommissioning]

1 plan and remove the pipeline”). Accordingly, the Nation is well justified in seeking
2 to intervene in this matter and obtain preliminary injunctive relief against
3 Defendants because the disposition of this action may impair or impede the
4 Nation’s ability to protect its interests.

5 **C. The Threat of Irreparable Harm from a Lack of Water to Combat
6 Wildfire Is Real and Outweighs any Harm that Strawberry Canyon May
7 Suffer from Continued Deliveries During the Pendency of this Case**

8 Defendants’ prior assertions, *see* ECF No. 66 at 3 (“[t]he most recent fire
9 cited by Mr. Garton occurred over five years ago—and ignores the alternative
sources of water available”), are tone deaf.

10 There is a substantial risk that the Nation will be immediately and irreparably
11 harmed if this Court does not preliminarily enjoin Defendants from carrying out the
12 Notice of Denial (as it pertains to delivering the Subject Water to Arrowhead
13 Springs) upon the expiration of the temporary authorization, as doing so would
14 deprive not only the Nation but various fire service agencies of a key water supply
15 to combat wildfire on and around the property. *See* Alexander Decl. at ¶¶ 3-4. The
16 Nation’s Fire Chief explains “why water must reach Arrowhead Springs by pipeline
17 to be useful for fire suppression.” ECF No. 81 at 9. Defendants’ argument that
18 preliminary injunctive relief is not warranted because it has been five years since
19 there was a local fire, and because there are alternative sources of water shows a
20 complete lack of understanding of fire risks and how to mitigate them. As the Fire
21 Chief explains, the risk of fire at and around Arrowhead Springs is as great as ever,
22 precisely because of the growth of vegetation over five years, to serve as fire fuel,
23 combined with unprecedented weather conditions. *See* Alexander Decl. at ¶¶ 6-8
24 (explaining that fires can happen anywhere at any time, a destructive fire occurred
25 last year just a few miles from Arrowhead Springs, and the fact that years have
26 passed since there was a fire in the immediate vicinity of Arrowhead Springs means
27 that there is a higher wildfire risk associated with additional vegetation). Little
28 needs to be said about the risks of fires in California, even in the middle of January,

1 not to mention the essential role that water plays in the effort to extinguish it. *See*
2 Ex. 22.

3 Defendants dismiss the harm that would flow from the cessation of water
4 deliveries to Arrowhead Springs, effectively arguing the Nation could just use its
5 other sources of water to fight fires. *See* ECF No. 81 at 31 (“The Nation has not
6 explained why the [Subject] water cannot be diverted once on the Nation’s own
7 property and used for fire suppression.”). Again, this reveals a complete
8 misunderstanding of the situation—as there is not currently infrastructure in place
9 to convey water from Strawberry Creek to the locations on the Arrowhead Springs
10 property where the Nation and fire service agencies access it to fight fires. *See*
11 Alexander Decl. at ¶ 4 (“[The Nation and fire service agencies] rely upon the water
12 delivered to Arrowhead Springs through BlueTriton’s infrastructure to combat fire
13 at and around Arrowhead Springs. If [Defendants are] allowed to shut off all water
14 deliveries from Blue Triton to [Arrowhead Springs], the Nation and entire
15 surrounding community will be in grave peril.”). Building such infrastructure takes
16 time, and again, the Nation is only asking for a stopgap to ensure that existing
17 facilities can be used in the interim, so that the Nation—and other fire service
18 agencies—are not without water to fight fires and save lives, while it seeks a more
19 permanent solution. *See* Hickey Decl. at ¶ 6; ECF No. 65 at ¶ 22. Defendants
20 ignore the reality of what is at stake, which is only made more perplexing (not to
21 mention irresponsible) given the uncontrolled wildfire currently raging across
22 southern California.

23 The Nation, various fire service agency officials, and even members of
24 Congress have expressed their profound concern that local and regional firefighting
25 efforts will be impaired if Defendants proceed with their plan to curtail deliveries of
26 the Subject Water to Arrowhead Springs after January 15, 2025, and remove the
27 facilities on SBNF lands thereafter. *See* Ex. 23; Ex. 4; ECF No. 65-4 at 2 (“The
28 Nation will not be able to fully operate such facilities and, more importantly, will

1 be left without water needed for fire suppression and safety during the dangerous
2 summer fire season if the [Notice of Denial] is implemented.”); ECF No. 65-5 at 17
3 (explaining that structures at Arrowhead Springs have been destroyed by fires three
4 times in modern history). These concerns have apparently fallen on deaf ears, as
5 Defendants continue steadfast on their plan to stop water deliveries and later
6 remove BlueTriton’s facilities from SBNF lands, even if it means gaining *some*
7 benefit² at a tremendous cost. It was inexcusable and illegal for Defendants to have
8 issued the Notice of Denial without consulting the Nation, *see* ECF No. 64-1
9 at 12-16, and this Court must now step in to prevent Defendants from carrying out
10 the same, thereby subjecting the Nation and its firefighting partners to irreparable
11 harm.

12 **D. Defendants Have Not Justified a Need to Terminate Arrowhead Springs’
13 Primary Water Supply on January 15, 2025**

14 Despite arguments to the contrary, ECF No. 81 at 22, Defendants can further
15 modify their decision and allow the Subject Water’s continued delivery to the
16 Nation during the pendency of this case, and beyond. Binney Decl. at ¶ 33.
17 Defendants never explain why they cannot provide such an extension; in fact, there
18 is no explanation. Indeed, Defendants have already twice extended BlueTriton’s
19 authorization to allow continued delivery of the Subject Water to the Nation (the
20 second until January 15, 2025, ECF No. 27-1), demonstrating the agency has the

21 _____
22 ² Defendants vaguely imply that restoring flows in Strawberry Creek is the benefit
23 that will result from halting deliveries of the Subject Water, *see* ECF No. 81 at 314,
24 but they do not (and cannot) quantify said benefit. Indeed, this is because
25 Defendants have not adequately analyzed the positive and negative impacts that
26 will occur if they halt deliveries and remove BlueTriton’s facilities from SBNF
27 lands. *See* ECF No. 65-10, Hamai Decl. at ¶¶ 13-15. Further, allowing continued
28 deliveries of the Subject Water to Arrowhead Springs would result in a lesser
amount of water being diverted from Strawberry Canyon than has been historically
diverted from Strawberry Canyon by BlueTriton, so there would still be ample
restoration of the flows in the creek.

1 power to extend water deliveries until the Nation can secure its own SUP or some
2 other resolution. The Under Secretary of the agency that oversees the USFS
3 confirmed as much. Binney Decl. at ¶ 33. Any incremental environmental benefit³
4 that may theoretically exist from halting deliveries of the Subject Water
(Defendants have failed to make a showing or share any studies bearing on this
5 issue), cannot outweigh the significant harm the Nation will suffer from cutting off
6 its water supply for Arrowhead Springs. Indeed, the Nation only receives
7 20 percent of the water in comparison to BlueTriton's 80 percent. ECF No. 65-10,
8 Hamai Decl., at ¶ 7.

9
10 As shown, the Subject Water is essential for the Nation and area fire service
11 agencies to fight fire at and around Arrowhead Springs. Any benefit to the stream
12 system that may result has yet to be shown, and indeed, when the Nation asked for
13 studies involving the health of Strawberry Creek, Defendants indicated that such
14 studies were not yet complete. *See* Binney Decl. at ¶ 14. Therefore, these
15 theoretical environmental benefits outweigh the imminent threat of catastrophic
16 wildfire, nor do they outweigh the risk of rendering Arrowhead Springs inoperable.
17 BlueTriton's decommissioning plan, which Defendants expressly acknowledge may
18 be approved during the pendency of this case, *see* ECF No. 73 at 2-3, could
19 significantly impact the quality of water in Strawberry Creek, and raises the
20 question of whether environmental benefits will even result from the
21 infrastructure's removal. ECF No. 65-10 at ¶¶ 12-14. The risk to Arrowhead
22 Springs (and surrounding communities), on the other hand, is real, quantifiable, and
23 imminent. *See* Alexander Decl. at ¶¶ 4-6.

24
25 ³ The Nation desires to steward its ancestral land and ensure a healthy ecosystem.
26 However, Defendants have not substantially justified that removal of the century-
27 old infrastructure would provide environmental benefits, and have not explored
28 how the infrastructure could be used to boost streamflow throughout the entire
course of Strawberry Creek, which the Nation believes is a valid option. ECF
No. 65-10 at ¶ 12.

1 Further, Defendants inaccurately allege the Nation will receive the Subject
2 Water regardless of whether BlueTriton is prohibited from delivering it to the
3 Nation, because, according to Defendants, such water will simply flow down
4 Strawberry Creek and across the Nation's land, and the Nation has rights that allow
5 it to divert from the creek at Arrowhead Springs. *See* ECF No. 81 at 18, 24. This
6 assertion fails to recognize the complex hydrology and geology involved, and
7 reflects a fundamental misunderstanding of water law and the difference between
8 documented water rights ("paper water") and the ability to access and use that water
9 ("wet water"). While the Nation does indeed have the right to divert water from
10 Strawberry and East Twin creeks for use at Arrowhead Springs from structures
11 other than BlueTriton's pipeline, infrastructure to allow such diversion does not
12 currently exist. ECF No. 65-6 at ¶ 12; ECF No. 65-10 at ¶ 10. Water cannot
13 magically be applied to beneficial uses simply because a water user has the right to
14 do so; rather, diversion facilities, pipelines, pumps, and other water delivery
15 infrastructure must be designed and constructed prior to this happening.
16 Defendants' misunderstanding of on-the-ground operations of Arrowhead Springs,
17 ECF No. 1-1 at 2-3, highlights the need for an extension beyond January 15, 2025,
18 to provide the Nation with time to sufficiently explore alternatives to the Subject
19 Water.

20 **E. The Nation's Interests Are Not Adequately Represented by the Plaintiff**
21 Defendants claim the Nation's interests are adequately represented by
22 BlueTriton. Not only is it deeply offensive for the federal government to allege that
23 a private, for-profit company can adequately represent an Indian tribal government,
24 it also highlights Defendants' misunderstanding of their trust obligation to the
25 Nation and requirement to operate on a government-to-government basis—which is
26 a foundational concept recognized for well over a century. There is no question
27 under federal law that Defendants and the Nation enjoy a unique political
28 relationship that mandates Defendants to meaningfully consult with and consider

1 impacts to the Nation beyond what is required in Defendants' dealings with
2 BlueTriton. Even if BlueTriton and the Nation are seeking similar practical
3 outcomes, the Nation alleges separate legal claims against Defendants that are
4 rooted in this government-to-government relationship. BlueTriton necessarily lacks
5 the ability to assert and defend the Nation's sovereign and economic interests, and a
6 robust discussion of sovereignty is notably absent from Defendants' briefing.

7 Furthermore, even if the Nation's interests and BlueTriton's interests are
8 currently somewhat aligned, they are hardly co-extensive. The Nation seeks relief
9 separate and distinct from BlueTriton. The Nation desires for BlueTriton to
10 continue delivering the Subject Water to the Nation until the Nation can secure
11 special use authorization and/or further develop alternative water supplies.
12 Proposed Complaint-in-Intervention, ECF No. 64-1 at 16-17. BlueTriton, however,
13 seeks to maintain its commercial water bottling operation in perpetuity. ECF No. 1
14 at 10. The parties also possess distinct rights. BlueTriton is entangled in a dispute
15 with the SWRCB regarding certain water rights. ECF No. 2 at 11. The Nation is
16 not involved in that proceeding, and the SWRCB does not dispute that the Nation
17 possesses water rights that authorize BlueTriton's continued delivery of the Subject
18 Water to Arrowhead Springs. ECF No. 15-6 at 91.

19 **F. Defendants Downplay the Scope of the Decommissioning Plan and Its
20 Potential to Harm the Nation, All While Encouraging the Nation to
Apply for a SUP that Cannot Be Approved Without Infrastructure**

21 Defendants indicate they will provide the Nation a mere 30-days' notice of
22 their approval of BlueTriton's decommissioning plan, and contend this is sufficient
23 to consider potential impacts of this plan to the Nation's property and resources.
24 ECF No. 73 at 2-3. Accordingly, decommissioning could begin during the
25 pendency of this case, at which point the Nation would have to come to this Court
26 again to seek a preliminary injunction. Whether decommissioning is approved this
27 month or next does not change the fact that the Nation currently relies on the
28 Subject Water delivered through infrastructure Defendants plan to remove. The

1 Nation needs this water to operate Arrowhead Springs, and as has occurred for
2 nearly a century, the Nation and surrounding communities rely on this water for
3 wildfire suppression purposes.

4 Defendants assert that if the Nation relies on the Subject Water, it can apply
5 (and should have applied) for a SUP to operate BlueTriton's infrastructure. They
6 make this assertion, all while seeking to immediately implement a
7 decommissioning plan that would remove the infrastructure upon which a SUP
8 would rely. Defendants' position could not be more disingenuous. Indeed, if
9 Defendants were truly open to ensure the Nation's water and property interests at
10 Arrowhead Springs were protected, and thus amenable to granting the Nation a
11 SUP to secure water through BlueTriton's infrastructure, they would not be seeking
12 its the immediate removal.

13 **G. The Nation Is Likely to Succeed on the Merits in Its Motion for a
14 Preliminary Injunction**

15 Defendants assert that they did not violate the NHPA, the NFMA, or their
16 trust obligation to the Nation in issuing the Notice of Denial and subsequent
17 modifications. Defendants' refusal to accept responsibility for their shortcomings
18 is not persuasive.

19 Defendants concede that Arrowhead Springs constitutes a culturally and
20 historically valuable property that warrants NHPA review and section 106
21 consultation. ECF No. 81-4 at 1-2. However, Defendants allege that such review is
22 only required when *granting* special use authorization rather than when *denying* it.
23 However, this argument is not supported by record or law. Defendants' prior
24 section 106 consultation occurred eight years ago when they were merely extending
25 BlueTriton's prior special use authorization to allow continued operation of the
26 infrastructure as had occurred historically. During that process, Defendants
27 determined the undertaking was likely to have little effect on historic properties
28 because it would "not authorize surface or resource disturbance." ECF No. 81-4

1 at 2. The Notice of Denial, however, terminates that authorization and mandates an
2 intensive decommissioning process that will involve removal of miles of water
3 delivery infrastructure. The plan requires over 10,000 helicopter flights, provision
4 of on-site materials such as fuel, oil, cement, and sanitary facilities, and could cause
5 landslides and other hydrologic impacts. ECF No. 65-10, Hamai Decl. at ¶ 12.
6 This process poses a much more serious threat to the cultural and historical
7 resources at Arrowhead Springs than simply continuing a century-long status quo
8 of water delivery. As such, the action warrants its own NHPA analysis.

9 Defendants further concede that approval of a SUP would require section 106
10 consultation, but that denial of such a permit does not. ECF No. 81 at 17 n.2.
11 However, Defendants nowhere acknowledge the licenses and authorizations
12 involved with the removal plan, which will require official approval by Defendants,
13 and once approved, grant BlueTriton a license to occupy the SBNF to execute
14 removal. The Notice of Denial and subsequent modifications clearly constitute an
15 undertaking that requires Defendants to engage in NHPA section 106 consultation.

16 Defendants also try to skirt their duties to tribal nations under the SBNF
17 forest plan by arguing such duties are unenforceable and merely aspirational.
18 However, part 3 of the SBNF forest management plan explicitly provides that
19 “[s]tandards are mandatory requirements that come into play as site-specific
20 activities are planned for implementation, and are designed to be consistent with
21 achieving the objectives and desired conditions. The standards act as thresholds or
22 constraints for management activities or practices . . . ,” as shown on page 2 of
23 part 3 of SBNF management plan. Standard 60 within the forest management plan,
24 on page 13, part 3 provides that “[u]ntil proper evaluation occurs, known heritage
25 resource sites shall be afforded the same consideration and protection as those

1 properties evaluated as eligible to the National Register of Historic Places.”⁴
2 Defendants do not deny their knowledge of the historical and cultural resources that
3 exist at Arrowhead Springs, as indicated by their long ago consultation with the
4 Nation on the prior renewal of BlueTriton’s permit, ECF No. 81-4, yet allege that
5 continuing the status quo of water delivery would implicate a historical analysis but
6 that terminating the status quo and order an intensive removal does not implicate
7 such an analysis. This argument is illogical and unpersuasive.

8 Defendants concede they violated their own internal policies (e.g., Joint
9 Secretarial Order, *see* ECF No. 64-2 at 18, 22), by providing no response to that
10 argument. As asserted in the Nation’s pending motion, agencies violate the APA
11 when they disobey their own internal policies. *Id.* at 22-24.

12 Defendants challenge the applicability and enforceability of the executive
13 orders and agency pronouncements imposing specific obligations on Defendants in
14 their dealings with the Nation, claiming that only treaties, statutes, and
15 regulations—but not executive orders and agency directives—can form the basis of
16 a valid breach of trust claim. ECF No. 81 at 23. However, “an executive order is
17 judicially enforceable . . . if it has the force and effect of law,’ which is true when it
18 is ‘grounded in a statutory mandate or congressional delegation of authority.’ ”
19 *Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996) (citing *Chrysler Corp. v. Brown*,
20 441 U.S. 281, 303-04 (1979)); *W. Watersheds Project v. BLM*, 629 F. Supp. 2d 951
21 (D. Ariz. 2009) (“Presidential proclamations and executive orders have the force
22 and effect of laws when issued pursuant to a statutory mandate or delegation of
23 authority from Congress”) (quoting *Indep. Meat Packers Ass ’ns v. Butz*, 526 F.2d
24 228, 234 (8th Cir. 1975)). Further, agency pronouncements have the force and
25 effect of law when they “(1) prescribe substantive rules—not interpretive rules,
26

27 ⁴ The 2006 Record of Decision and SBNF Management Plan can be found at
28 <https://www.fs.usda.gov/main/sbnf/landmanagement/planning>.

1 general statements of policy or rules of agency organization, procedure or
2 practice—and (2) conform to certain procedural requirements.” *River Runners for*
3 *Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010) (internal citations
4 omitted). It is a well-established doctrine of federal Indian law that Congress has
5 exclusive authority to regulate affairs with Indian tribes. *Cherokee Nation v.*
6 *Georgia*, 30 U.S. 1, 39 (1831). Executive orders and agency directives related to
7 agency dealings with Indian tribes are based in Congress’ delegation of that
8 authority to agencies and therefore have the force and effect of law.

9 Defendants claim they have not breached their trust responsibility to the
10 Nation because they have not violated any laws. However, as explained above and
11 in the Nation’s pending motion, Defendants’ decision to terminate the Nation’s
12 water supply for Arrowhead Springs without notice, consultation, consideration, or
13 attempt to mitigate adverse impacts indeed does violate federal law and, therefore,
14 constitutes a violation of the United States’ sacred trust. *Pit River Tribe v. United*
15 *States Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006). The Nation is likely to
16 succeed on the merits of its claims.

17 Assuming *arguendo* that an executive order cited in the Nation’s complaint-
18 in-intervention does not have the force or effect of law (or are not binding on
19 Defendants), the USFS has promulgated regulations that incorporate and implement
20 Executive Order 13175. See 36 C.F.R. § 219.4(a)(2). Thus, Defendants’
21 contention that they have no trust responsibilities here, and need not consult with
22 the Nation before issuing the Notice of Denial (which orders the curtailment of
23 water deliveries and removal of facilities in the SBNF), is erroneous and contrary to
24 their own regulations. See *Nebraska v. Su*, 121 F.4th 1, 16 (9th Cir. 2024) (“[j]ust
25 because an agency’s regulations are based on an executive order, this ‘hardly seems
26 to insulate them from judicial review under the APA, even if the validity of the
27 [executive order] were thereby drawn into question’ ”) (quoting *Chamber of Com.*
28 *of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996)).

II. CONCLUSION

Defendants' arguments opposing the Nation's intervention and requested preliminary injunctive relief lack merit. Defendants acted unlawfully by issuing the Notice of Denial, and still, the Nation was willing to collaboratively work with Defendants to develop an out-of-court solution allowing continued deliveries of the Subject Water to Arrowhead Springs. Defendants have refused and are determined to carry out the plan set forth in the Notice of Denial, leaving the Nation with no choice but to seek judicial relief to avoid irreparable harm that will come after January 15, 2025, once the temporary authorization expires.

Accordingly, the Nation requests that the Court grant both its Motion to Intervene and corresponding Motion for Preliminary Injunction.

The undersigned, counsel of record certifies that this reply contains 4928 words, which complies with the word limit of L.R. 11-6.1.

Respectfully submitted,

SOMACH SIMMONS & DUNN, PC

DATED: January 11, 2025

By s/ *Stuart L. Somach*

Stuart L. Somach (SBN 90959)

Maximilian C. Bricker (SBN 350150)
Attorneys for [PROPOSED] Plaintiff-
Intervenor Yuhaviatam of San Manuel
Nation, a federally recognized Indian tribe,
also federally recognized as San Manuel
Band of Mission Indians

TABLE OF EXHIBITS

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| 22 | January 8, 2025 – Fire Hydrants Ran Dry as Pacific Palisades Burned. L.A. City Officials Blame “Tremendous Demand,” <u>Los Angeles Times</u> , <u>by Matt Hamilton and David Zahniser.</u> |
| 23 | January 7, 2025 – Letter from Dan Munsey, Fire Chief, to Daniel Little, Chief Intergovernmental Affairs Officer |
| 24 | December 18, 2024 – Letter from Members of Congress to Secretary Tom Vilsack |
| 25 | March 22, 2024 – Email from Eric Ustation regarding Topics of Discussion for March 26, 2024 Meeting at Arrowhead Springs |
| 26 | March 26, 2024 – Agenda Distributed at March 26, 2024 Meeting at Arrowhead Springs |

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